No. 2412.

In the United States Circuit Court of Appeals, Ninth Circuit.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, A CORPORATION, PLAINTIFF IN ERROR,

v.

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

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In the United States Circuit Court of Appeals, Ninth Circuit.

San Pedro, Los Angeles & Salt Lake Railroad Company, a corporation, plaintiff in error,

v.

The United States of America, defendant in error.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

STATEMENT.

In order that the contentions of the Government, made at the trial of these cases and now presented to this court for its determination, may be better understood, it is deemed advisable briefly to refer to a few of the agreed and undisputed facts relied upon in support of such contentions.

Case No. 106.

Case No. 106 consisted originally of five causes of action, all relating to the hours of service of certain telegraph operators of plaintiff in error (hereinafter called defendant). The fourth and fifth causes of action have been disposed of, leaving but the first three for the consideration of this court.

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The first cause of action relates to Operator Grandee, who was kept in continuous service from 8 a. m. to 8 p. m., January 19, 1911; and the second and third to Operator Dugan, who was in continuous service for the same length of time, beginning at 8 p. m., January 19, 1911 (second count), and again for 12 consecutive hours, beginning at 8 p. m. the following day (third count). Both of these operators were in the employ of the defendant at Kelso, Cal.

As its excuse for requiring the above service, defendant introduced evidence to show that the same was due to, or necessitated by, an emergency. (Rec. 104, 105.)

By way of rebuttal the Government endeavored to show that the service required of these operators was not due to an emergency, but was the result of defendant's own negligence or lack of precaution. And in support of this contention it was shown (Rec., 109) that between Salt Lake City and Los Angeles defendant maintained 71 telegraph offices, at which it employed 106 operators; that many of these were 3-men, or continuously operated, offices, while others were 2-men offices; that at the time in question defendant maintained no standing list of reserve operators, but that when an operator got sick or quit work defendant had to trust to finding some one off the line to take his place.

In further support of the Government's contention that the defendant was negligent in not main-

taining at least one or two relief operators, attention is directed to the following testimony of the witness Smith (Rec., 105, 106):

> At that time telegraph operators were extremely scarce. The Western Union and Postal companies were using a great many operators, and the men preferred to work in Los Angeles rather than go to the desert points, such as Kelso and Otis; they are both in the desert. At that time we had difficulty in getting operators to go there.

The Government also contended that even conceding all the proven facts might have been an emergency at one time, such defense was of no avail to defendant with respect to the service required of Operators Grandee and Dugan on January 19–21, 1911, because the testimony showed:

First. That January 19, 1911, was Thursday.

Second. That beginning Monday, the 16th, and on each of the two following days, the same service was required of both operators as on the days set forth in the complaint.

So with respect to that provision of the act having reference to the hours of service of telegraph operators, the following question is presented to this court for its determination:

Question Involved in Case No. 106.

Where an operator, by reason of some emergency, is required and permitted to be and remain on duty for only three additional hours on each of the first three days of a week, instead of the maximum of four

additional hours permissible in such cases, is the carrier thereby excused for requiring and permitting the same operator to be and remain on duty for the same period (12 hours) on the fourth day simply because on the preceding days the full period of service allowable in cases of emergency was not required?

ARGUMENT.

(Case No. 106.)

That part of section 2 of the hours of service act having reference to telegraph operators, reads as follows:

> *Provided*, That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day * * * except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week.

The permission given a carrier, in case of emergency to prolong the hours of service of an operator "for *four* additional hours in a twenty-four-hour period on not exceeding *three* days in any week," can not be construed so as to allow these 12 additional hours of "emergency" service to be distrib-

uted over a period of *more than three days* in that week.

The work of the telegraph operator in a day and night office is of such a nature that Congress deemed it advisable to limit his work to 9 hours a day, instead of 16 hours, as in the case of trainmen, and consequently fixed the period of rest of the former at 15 hours a day; of the latter at 8 and 10 hours. And there are many good reasons why the hours of service of an operator should be materially less and his hours of rest more than those of a trainman. The latter is engaged in the movement of but his own train; the operator is connected with, and receives, transmits, and delivers orders affecting the movements of all trains on his division.

In regulating the hours of service of all employees in any manner connected with train movements, Congress considered the necessity of sometimes extending these hours on account of some unavoidable accident or other emergency. With respect to trainmen, the limitation of their hours of service in cases of unavoidable accidents or casualties is indefinite, to be fixed by judicial construction, which phase of the law will be discussed later in this brief in case No. 243. As to the operators' hours of service in cases of emergency, the limitation is definite, fixed by legislative enactment.

In case of an emergency an operator may be employed for "4 additional hours in a 24-hour period *on not exceeding three days in any week.*" By this

plain limitation Congress has said that an emergency can not operate as a legal excuse for prolonging the period of service of an operator on more than three days a week.

It is a well-settled rule that where the language of a statute is unambiguous and its meaning is plain, no room is left for construction.

The fact that the operators in question worked only three and not "four additional hours" does not add strength to the contention of the carrier, nor operate to authorize excess service on the part of those employees four days a week. If such a departure from the plain, unambiguous words of the statute can be said to be even within the reason thereof, it must be conceded that such excess service need not stop at four days, but may continue all week.

We do not doubt that there are many cases of sudden illness that would justify excess service of an operator within the limitations prescribed by Congress; but in fixing this limitation at four hours a day, and three days a week, Congress evidently considered that as sickness and death must be expected, carriers would maintain one or more relief operators and thus take *some little precaution* to avoid the results of causes deemed inevitable.

This course would seem to have been the proper one, particularly in view of the fact that operators were "extremely scarce." But with full knowledge that "men preferred to work in Los Angeles rather than go to the desert points," the record does

not disclose the slightest effort to maintain a single relief operator and thus be in a position to avoid working other operators beyond the limitations prescribed by Congress.

It may be argued that as sickness and death are always uncertain as to time, it would be impossible for the carrier to know how many relief operators it should have in its employ; and to a certain extent this is true. But the fact remains that had the carrier maintained one relief operator it would thereby have been in a position to avoid the acts complained of by the Government.

> Every overworked employee presents a distinct danger. (*M., K. & T.* v. *U. S.,* 231 U. S., 112.)

Even though Congress had not prescribed the limitation of excess service of operators at three days a week, we believe the trial court would still have been justified in directing a verdict for the Government, based entirely on the ground that the circumstances did not present a clear case of emergency, but rather that the excess service of the two operators was due to negligence or lack of precaution.

The facts in the case were not disputed; therefore this question of emergency was but one of law and falls clearly within the rule laid down in the case of *Ellis* v. *United States* (206 U. S., 257), wherein the court said:

> Even if, as in other instances, a nice case might be left to the jury, what emergencies

> are within the statute is merely a constituent element of a question of law, since the determination of that element determines the extent of the statutory prohibition and is material only to that end.

This rule was cited and followed by the Circuit Court of Appeals for the Eighth Circuit in the case of *United States* v. *Southern Pacific Company* (209 Fed. Rep., 562), which involved the excess service of certain operators and claimed to be necessitated by the illness of a third operator.

In the Southern Pacific case the court also said—

> *that the statute is not violated if no employee worked overtime more than three days out of seven.*

There was some testimony to the effect that the delay in getting a relief operator to Kelso was due to the fact that while one was sent there on the 17th it was found necessary to stop him en route in order to establish a telegraph office at the scene of a wreck (Rec., 104, 105); and therefore it may be argued from this that the excess service of the operators in question was the result of an unavoidable accident. In other words, it may be contended that the proviso in section 3 of the act refers to telegraph operators, and that their hours of service should be unlimited "in any case of casualty or unavoidable accident or the act of God."

This defense is not now open to the carrier, for it was not urged in the court below. In fact, the amended answer expressly disclaims any intention

to excuse the excess service of Operators Grandee and Dugan on grounds other than that of emergency.

The amended answer (Rec., 27) sets up the illness of Starkey and the efforts made to get a relief operator, and concludes as follows:

> Wherefore, this defendant says that by reason of the aforesaid facts, an emergency arose and existed which required and made it necessary and imperative for this defendant to require the said J. N. Grandee to work overtime, as alleged in the complaint.

The amended answer is the same with respect to Operator Dugan, the employee involved in the second and third counts.

It is respectfully submitted that as to case No. 106 the judgment of the lower court should be affirmed, and for the following reasons:

First. Because the question of whether the agreed and undisputed facts in this case constitute an emergency was one of law, properly determinable by the court.

Second. Because each of the employees in question was required to work overtime more than three days in a week.

STATEMENT.

(Case No. 243.)

The third, fourth, and fifth causes of action in this case relate to defendant's passenger train No. 1, running from Salt Lake City to Los Angeles; the

three members of its crew, the conductor and two brakemen, however, operated it only from Las Vegas to Los Angeles. (Rec., 91.)

The scheduled running time of No. 1 between Las Vegas and Los Angeles was 13 hours and 30 minutes added to which would be 30 minutes preparatory service, so that under ordinary conditions the crew would be on duty at least 14 hours. (Rec., 100.)

On the days in question No. 1 followed its usual route, except between Crucero and Daggett, a distance of 41.1 miles. Between these points it was required to detour via Ludlow, thus increasing the distance between Crucero and Daggett on account of such detour by approximately 28 miles. (Rec., 92.)

The distance from Crucero to Los Angeles, by the usual route, is 199.7 miles; but by Ludlow, approximately 227.7 miles. (Rec., 92.)

No. 1 suffered numerous delays at or about Crucero, finally leaving there at 3 a. m., at which time the train crew had been on duty 10 hours; and from there to Los Angeles, without detouring, was a run of 8 hours and 35 minutes. (Rec., 102.)

When No. 1 left Crucero it was known to defendant that the crew, if required to continue the operation of their train to Los Angeles, would be on duty over 16 hours. (Rec., 100.)

When No. 1 reached Daggett at 11.45 a. m., the crew had been on duty 18 hours and 45 minutes. (Rec., 98.)

The running time from Daggett to San Bernardino is approximately 4 hours and 30 minutes; from Daggett to Los Angeles about 8 hours. This statement is based upon the actual running time of No. 1 between these points on the days in question, the evidence showing (Rec., 98) that no delays were encountered between Daggett and Los Angeles.

San Bernardino was " a terminal," but was not *the terminal* of No. 1 or of the employees in question. (Rec., 96.)

Emergency crews were maintained by defendant at Los Angeles. (Rec., 101.)

> *No effort was made to relieve the crew either at Daggett or San Bernardino or by sending out a relief crew from Los Angeles.* (Rec., 101.)

The sixth, seventh, and eighth causes of action relate to the train crew of defendant's passenger train No. 7, running between the same points as No. 1, and who were kept in continuous service 24 hours and 55 minutes.

We do not deem it necessary to dwell in detail on the facts with respect to No. 7, except to say that when it reached San Bernardino the crew had been on duty 21 hours and 34 minutes, yet no effort was made to relieve them, " *though it could have been done by sending a crew from Los Angeles.*" (Rec., 94, 95.)

So with respect to both No. 1 and No. 7, the following testimony of defendant is most pertinent:

> *It is a fact that when we knew these trains were going to exceed the 16-hour limit, we could have gotten relief for them by sending men out from Los Angeles.* (Rec., 110.)

The remaining causes of action relate to the several engineers and firemen of certain of defendant's trains who were kept in continuous service in excess of 16 hours. Most of the facts with respect to these causes of action are set forth in a stipulation. (Rec., 82–90.)

In explanation of the service required of these engineers and firemen, the following testimony was given:

> I am familiar with the stipulation concerning counts 1 and 2 and counts 9 to 22, inclusive. The purpose of keeping up a certain amount of steam on these engines was for convenience in lubricating. (Rec., 95.)
>
> Referring to the case of trains that were towed in, of which I spoke in my testimony, about keeping up steam for purposes of lubrication, that meant that as long as an engine is under steam or not, the lubrication boxes or valves are taken care of automatically, but when the engine becomes cold the lubrication must be done by hand, and it was to save hand labor that the steam was kept up, and for no other purpose. (Rec., 107.)

Questions Involved in Case No. 243.

1. Does that provision of section 2 of the hours of service act, requiring that whenever any employee "shall have been continuously on duty for 16 hours he shall be relieved," mean:

   (a) That he must be relieved only from the particular character of service he has been performing? or

   (b) That he must be relieved from all service of whatsoever nature?

2. Does a delay to a train by reason of some unavoidable accident automatically extend to the carrier a license to permit the employees thereon to continue the operation of such train to the end of their usual or customary run?

3. Where a carrier fails to relieve an employee after he has been in continuous service 16 hours, can such failure be justified by merely showing that somewhere on its run the train in question was delayed by one of the causes set forth in the proviso of section 3 of the hours of service act?

4. Where a train is delayed by some unavoidable accident, or the like, and by reason thereof the carrier is unable to relieve the employees thereon the very instant their 16-hour period of service expires, does such excusable failure to prevent some excess service on the part of its employees thereby justify the carrier in abandoning, or license it to abandon, all efforts thereafter to provide relief for such employees?

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5. Do the words, "a terminal," as used in the proviso of section 3 of the hours of service act, mean:

(a) THE terminal from which an employee in question starts on his trip? or

(b) ANY terminal through which such employee may pass while en route to the end of his usual or customary run?

I.

Whenever an employee has been continuously on duty for sixteen hours he must be relieved, not only from the service he has been performing, but relieved from every kind of service and from all responsibility therefor should the occasion arise.

It will be unnecessary to enter into any discussion of this question, for the reason that this court has already decided the same in favor of the Government in two other cases.

> *Great Northern Ry.* v. *United States,* decided February 24, 1914; certiorari denied by the Supreme Court on May 11, 1914. (34 Sp. Ct. Rep., 776.)
>
> *Northern Pacific Ry.* v. *United States,* decided May 4, 1914. (213 Fed. Rep., 577.)

The same question has also been decided in favor of the Government by the Circuit Court of Appeals for the Eighth Circuit in the case of *San Pedro, Los Angeles & Salt Lake Railroad* v. *United States,* decided March 27, 1914. (213 Fed. Rep., 326.)

II, III, IV.

The mere delay to a train on account of some unavoidable accident will not license the carrier thereafter to disregard or ignore the mandatory provisions of section 2 of the hours-of-service act.

"The delay," as used in the proviso of section 3 of the hours-of-service act, does not refer to a delay that

some particular train may have suffered, but has reference to the delay of the carrier in complying with the mandatory provisions of section 2 of the act.

Where it is apparent to a carrier that, by reason of an accident clearly unavoidable, it is unable to relieve an employee before he has been in service over 16 consecutive hours, the duty, nevertheless, still devolves upon the carrier thereafter to provide relief at the earliest opportunity and thereby reduce to a minimum such employee's excess service.

As all the above questions are closely related, they will be considered under one general discussion of the limitations placed upon the mandatory provisions of section 2 of the act by the proviso of section 3.

Section 2 of the act provides:

> *That it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employee subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved* and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty. * * *

The italicized portion indicates that provision of the act the construction of which is involved in this case.

The only limitation placed upon these mandatory provisions of section 2 is to be found in the proviso of section 3, upon which the carrier relies as an excuse or justification for its failure to relieve certain employees after 16 hours' continuous service.

This proviso reads as follows:

> That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen.

Reading together the mandatory provision of section 2 and this proviso, it is evident that "whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours *he shall be relieved*" unless the failure of the carrier so to relieve him is due to one of the causes named in the proviso.

It is the contention of the carrier that whenever a train is delayed somewhere on its journey by an unavoidable accident, or the like, such unavoidable delay, regardless of its duration, thereafter relieves the carrier from the mandatory provi-

sions of section 2. In other words, the carrier contends that the proviso should be so construed as to mean that any unavoidable delay to a train operates as a license to prolong the hours of service of the employees thereon far beyond the period prescribed by Congress. So to hold would be merely to limit the phrase, "*in any case of casualty,* * * *" to its narrow *interpretation* and justify a carrier in operating a train to its final terminal, without relieving the employees thereon, in all cases where that train encounters a delay which could not actually be foreseen when it left a terminal. This would be true even though the unforeseen delay were but half an hour, and the full service required of the employees in order to complete their run might be 18 or 20 hours.

"*The provisions of this act shall not apply in any case of casualty,* * * *" should be *construed* to mean that a carrier will be excused for requiring excess service of its trainmen *and for its failure to relieve them after they have been on duty 16 hours* only in those cases where a casualty, or the like, actually prevents a compliance with the mandatory provisions of section 2.

It was said in *United States* v. *Farenholt* (206 U. S., 226): "It seems that interpretation is the reading of a statute according to its letter, while construction is the reading of a statute according to its spirit and intent;" and in *Williams* v. *Gaylord* (186 U. S., 157) the court said: "The very essence

of construction is the extension of the meaning of a statute beyond its letter."

To illustrate the defendant's *interpretation* and the Government's *construction* of the act:

A train leaves W destined for Z. At X, a few miles from W, it is delayed one hour on account of an unavoidable accident. After that, no effort is made to relieve the crew; they continue to operate their train to Z and are there released from duty, having been in continuous service over 17 hours.

The Government contends that such unavoidable accident is not a license to the carrier to require more than 16 hours' continuous service of its trainmen; that it has but the effect of relieving the carrier from the penalty only in those instances where such accident has a direct or causal connection with the failure of the carrier to relieve the employees at the end of 16 hours.

The defendant says that because " the provisions of this act shall not apply *in any case* of * * * unavoidable accident " it is not required to make the slightest effort to prevent excess service on the part of its employees.

In urging such a construction the fact is lost sight of that one of " the provisions of this act " is the requirement that an employee *shall be relieved after* 16 hours' continuous service.

This emasculative construction can be no better illustrated than by the following:

A train is en route from W to Z, which ordinarily consumes about 14 hours. No unavoidable accidents are encountered, but on account of a large amount of traffic to handle it does not reach X, a station midway between W and Z, until the crew has been on duty 10 hours. It is known for some time that they can not reach Z and be relieved within 16 hours, and in order to comply with the requirements of the act, arrangements are made to relieve the crew at Y, where it is calculated the train will arrive approximately within 16 hours from the time it left W. But after leaving X the train is delayed for one hour by some casualty or unavoidable accident, and the provisions theretofore made to relieve the crew are abandoned, for, as the carrier contends, it is under no legal obligations to relieve the crew "*in any case of casualty or unavoidable accident.*"

The above illustration portrays the attitude of the carrier in the present case.

The attention of the court is called to the stipulation (Rec., 82–90), involving eight different freight trains. In each instance a relief crew was sent out and excess service avoided on the part of the conductor and brakemen; and might have been prevented as to the engineer and fireman had the relief crew been sent out sooner. But notice the action of the carrier with respect to the two passenger trains. In each instance the train was delayed by a casualty or unavoidable accident, which,

to a certain extent, jeopardized the lives of its passengers and crew; but instead of thereafter providing relief, *which could have been done,* the carrier requires the same crew, already enfeebled by excess service, to continue the operation of their train to Los Angeles, *and thus continue to jeopardize the lives of the passengers and crew.*

The contention of the carrier amounts to this: That under no circumstances is it required to relieve the crew of a passenger train, and for this reason: A passenger train runs on schedule; in the present case about 14 hours between Las Vegas and Los Angeles. In case the unforeseen does not happen the train will maintain its schedule; therefore, there will be *no necessity* of providing a relief crew; but in case the train is delayed by the unforeseen, there is *no legal obligation* to relieve the crew.

Looking at it in another way, the contention of the carrier is, that because it could not prevent the unavoidable delay to a passenger train it was not required to prevent excess service of its crew. *In other words, because it could not prevent the passengers and crew being endangered once, it was not required to remove the cause of future hazard.*

> This law was passed to meet a condition of danger incidental to the working of railroad employees so excessively as to impair their strength and alertness. It is highly remedial, and the public, no less than the employees themselves, is vitally interested in

> its enforcement. For this reason, although penal in the aspect of a penalty provided for its violation, the law should be liberally construed in order that its *purposes* may be effected. (*United States* v. *Kansas City Southern Railway Company,* 8th C. C. A.; 202 Fed. Rep., 828, and cases cited.)

This liberality of construction applies to that section of the act defining or creating the offense, but is of no avail to the carrier in its attempt to bring itself within the proviso. As was said by Mr. Justice Story in *United States* v. *Dickson* (15 Pet., 141, 165; 16 L. Ed., 689):

> The general rule of law which has ordinarily prevailed and become consecrated, almost, as a maxim in the interpretation of statutes, is that where the enacting clause is general in its language and objects and a proviso is afterwards introduced, that proviso is construed strictly and takes no case out of the enacting clause which does not fall fairly within its meaning. In short, a proviso carves special exceptions only out of the enacting clause, and those who set up any such exception must establish it as being within the words as well as within the reason thereof.

The defendant offered no evidence to show the least causal connection between the casualties or unavoidable accidents and its failure to relieve the crews after 16 hours' service. In fact the evidence conclusively shows a case of wanton neglect in permitting the passenger crews to operate their trains all the way to Los Angeles.

A carrier should not be excused for wholly disregarding the mandatory provisions of the act with respect to a certain train crew, even though they may have been delayed by an accident clearly unavoidable. There may be times when a carrier, by reason of some accident, is prevented from relieving a crew before they have been on duty *over* 16 hours, but we do not believe that the excusable failure to prevent some excess service is any justification for the failure of the carrier to prevent service many hours in excess of 16. To illustrate our meaning:

A train is en route from W to Z. When leaving Y the crew have been in continuous service 9 hours, but shortly thereafter are delayed by some unavoidable accident, the place of delay being where no relief can be immediately furnished. The crew remain on duty, assisting in removing the cause of the delay, but by the time this is done they have been in continuous service 16 hours and 30 minutes. From the scene of the accident the train proceeds to Z, a run of approximately 7 hours. Long before the wreck was cleared the officials knew that this train could not reach Z within 16 hours, but, in spite of this knowledge, no effort is made to relieve the crew at any place along the line and they are permitted to operate their train to the end of their usual run, their period of service being approximately 24 hours.

Now, this train was delayed by an accident clearly unavoidable, preventing the carrier from

relieving the crew before they had been on duty but little over 16 hours; but can such failure justify the carrier's neglect to provide relief at the earliest opportunity thereafter?

"*Whenever any such employee * * * shall have been continuously on duty for sixteen hours he shall be relieved * * **" unless the failure to relieve him is due to an unavoidable accident, or the like, and not due, as we believe, to the carrier's negligence in failing to take even ordinary precautions to provide relief, particularly when it is apparent that its trainmen, in the absence of relief, must remain in service an excessive number of hours.

It may be argued that it would be a hardship on the carrier to be required to take such precautions to provide relief and thus give to its employees and travelers that protection which we believe the law demands. This argument is a dangerous one and should not be heeded. The question of hardship is a dual one. There may be instances where the sending out of a relief crew might possibly be a hardship on the carrier from a financial point of view; but if we consider this phase of the question we must of necessity and reason consider the question of hardship from the point of view of those employees and travelers whose lives would be jeopardized by some act of omission or commission on the part of some trainman who is both mentally and physically impaired by being in continuous service from 20 to 30 hours.

In no single instance did any unavoidable delay to a train prevent the carrier's obedience to the mandatory provisions of section 2; therefore, there was not the least causal connection between the unavoidable accidents and the failure of the carrier to relieve its employees before they had been in continuous service over 16 hours.

In this connection we desire to call attention to the reasoning of the court in the case of *Newport News & Mississippi Valley Co.* v. *United States* (61 Fed. Rep., 488). Lurton, then circuit judge, in delivering the opinion of the court, said:

> The contention of counsel for appellant is that the excuse for overconfinement specified in the act, "storm," is one of a class within what the law regards as an "act of God," against which a common carrier does not insure, and that Congress has to that class added another of a different character, described as "other accidental causes"; that the use of the disjunctive "or" after "storm" indicates a purpose to except detentions due to causes not the act of God, and described by the term "accidental"; that this construction finds support in section 4388, which imposes the penalty only upon such carriers as "knowingly and willfully" fail to comply with the requirements.
>
> This reasoning, while plausible, is not satisfactory. To yield to it would emasculate a statute having a most humane object in view. Congress did not mean that simply because

the carrier had encountered a storm therefore he should be excused.

It must appear that the storm "prevented" obedience. The storm could not be prevented. Its consequences may be avoided or mitigated by the exercise of diligence. If, with all reasonable exertion, a carrier is unable by reason of a storm to comply with the law, then he has been unavoidably "prevented" from obeying the law. If, notwithstanding the storm, he could, by due care, have complied with the law, then he is at fault, because "his own negligence is the last link in the chain of cause and effect, and in law the proximate cause" of the failure to comply with the law. Therefore, to avail himself of the excuse of "storm," the carrier must show not only the fact of a storm, but that with due care he was "prevented," as an avoidable result of the storm, from complying with the law. We can reach but one conclusion as to the meaning of Congress by the expression "other accidental causes." * * *

An effect attributable to the negligence of the appellant is not an unavoidable cause. The negligence of the carrier was the cause, the unlawful confinement and unreasonable detention but an effect of that negligence.

This last case involved violations of the 28-hour law, in which the carrier is only required to exercise ordinary care in its efforts to comply with the provisions of that act; but under the hours of service act it should not be excused for exercising only ordinary care. The carrier should be held at

least to a high, if not the highest, degree of care, and only the exercise of such care in its endeavor to relieve an employee before he has been on duty over 16 hours should excuse such excess service.

The fact that a carrier exercised the required care to prevent an accident delaying a train does not relieve it from thereafter exercising some care to avoid the consequences of such unavoidable delay. But under no circumstances do we believe that an *excusable* delay to a train is a license for an *inexcusable* delay in relieving the employees thereon after 16 hours' continuous service.

This so-called "license" phase of the proviso was considered in a case against the Southern Railway Co., western district of North Carolina, decided October 30, 1913 (not yet reported). In that case it was the contention of the carrier that it was entitled to operate a train 16 hours and for so much longer as it might be delayed by one of the causes named in the proviso, and without relieving the employees thereon. On this phase of the question the trial court said:

> On that I rule that the occurrence of an accident or delay by the act of God or any case of casualty or unavoidable accident while the train is in course of transit from one terminal point to another does not mean that the entire act is suspended as to that train. To hold that the entire act would be suspended as to that train would be to hold that the 16 hours' limit did not apply to

> any train between terminals during the progress of whose transit between terminals any delay occurred from the exempting causes named in the statute. The delay might be any number of hours, from 5 to 10, and I hold that the statute does not mean that as to that train the operative period of service is extended from 16 to 21 or 26 hours, according as some delay from the exempting causes may occur whilst the train is in transit. I construe the statute to mean that the hours of service shall be extended in such cases only so far as may be necessary to permit the train to be operated to a point at which, due regard being had to all the circumstances of the particular case and the character of the train, the train crew could be relieved or be allowed to take the rest required by the statute.

Another case involving the same question is that of *United States* v. *Oregon-Washington Railroad & Navigation Company* (No. 5943), district of Oregon, decided June 4, 1914. The answer of the defendant alleged that the train in question was delayed by certain causes coming within the proviso, " and that by reason of said delays and not otherwise the defendant required said employees to remain on duty 1 hour and 15 minutes in excess of 16 hours, and but for said delays said employees would not have remained on duty any amount of time in excess of 16 hours and would have completed the trip from La Grande to Umatilla in

much less than 16 hours' continuous run." The answer also alleged that the causes of the delay were not known to the carrier or its officer or agent in charge of said employees at the time such employees left "the La Grande terminus" (the initial terminal for that crew).

To this answer the Government demurred and assigned the following grounds of demurrer:

> 1. It does not appear from said answer that the causes of the alleged delays between La Grande and Umatilla were not known to the defendant or its officer or agent in charge of the employee named in each cause of action of plaintiff's petition at the time he left a terminal.
>
> 2. It does not appear from said answer that the alleged delays between La Grande and Umatilla prevented defendant from relieving the employee named in any of said causes of action before he had been continuously on duty more than sixteen hours.
>
> 3. It does not appear from said answer that the failure of defendant to relieve the employee named in any of said causes of action before he had been continuously on duty more than sixteen hours was due to a casualty or unavoidable accident or the act of God; or that the failure to so relieve such employee was the result of a cause not known to the defendant or its officer or agent in charge of such employee at the time he left a terminal and which could not have been foreseen.

> 4. It does not appear from said answer that defendant made any effort whatsoever to relieve the employee named in any of said causes of action before he had been continuously on duty more than sixteen hours.

In sustaining the Government's demurrer the following remarks of District Judge Bean are pertinent:

> In this case the judgment of the court is that this answer does not state a defense. This service act prohibits the company from permitting its employees to remain in service more than sixteen consecutive hours, unless it shall be due to casualty, unavoidable accident, or the act of God, or when the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time the employee left a terminal, and which could not have been foreseen.
>
> So I take it the purpose of this statute is to prohibit a railway company from allowing or permitting its employees to remain in consecutive service more than sixteen hours unless the reason for the delay comes within the particular exceptions of the statute, and therefore it seems to me that where a railway company's train is delayed and the sixteen hours expire, it is the duty of the company to relieve its employees if it can do so by sidetracking its train, if there is a station where it can be done, and that it cannot use the delay as a part of the time necessary to reach one of its terminals; otherwise it might con-

tinue the service for an indefinite length of time. So I take it this answer is not sufficient, and the demurrer should be sustained.

In the case of *United States* v. *Baltimore & Ohio Railroad Company,* No. 1710, Southern District of Ohio, decided December 17, 1913, the same question was raised. In his charge to the jury, District Judge Sater said:

> The defendant's position, if I comprehend it correctly, is this: That where a delay occurs that is excusable under the law, the train crew may then go forward and complete the journey; go forward until it reaches its destination, although in so doing it may run over the 16-hour period; that the common carrier is not then required to relieve the crew, even if it may do so; that the common carrier has the right to have them complete the journey where a delay has occurred which is excusable, even though the time to complete the journey is in excess of the sixteen-hour period. Do I state your position correctly?
>
> Mr. DURBAN. Yes, your Honor, except that we claim that the statute by its terms says that in that case the act shall not apply.
>
> Mr. KING. And provided that the period of the excusable delay equals the period of the excess or the overtime; that is admitted in this case.
>
> The COURT. That is the position of the defense as their interpretation of the law.
>
> The Government takes a different view. Its view is that even though a delay excus-

able in law has occurred, after it is over and the train proceeds the carrier is not excused from working the men or permitting them to work beyond the 16-hour period, or further beyond the 16-hour period than is necessary to relieve them.

This is the Government's position, if I understand it rightly, viz, that men may not be held to their work or permitted to continue it after the 16-hour period a longer time than is necessary to relieve them.

If I understand its position, it is this: Suppose a crew starts on a run that will take 12 hours. It is out 2 hours. A delay occurs which is excusable in law. Suppose it is held there 9 hours; they would have 10 hours more of service if they should complete the whole trip. If they remained on duty to the end of the trip, they would put in 21 hours of work. Now, if I understand the defendant's position, it is that they would have the right to go forward and complete that trip although it might take them 21 hours. The Government's position is that the law does not mean that. The defendant's position is that the law would not apply to that kind of a case. The Government's position is that it does apply and that it does not intend that the men shall work beyond the 16 hours, if they can be reasonably relieved, and, if they reach a point at which they may be thus relieved, it is then the duty of the carrier to relieve them. We have not had this question de-

> cided by the higher courts. I have concluded that the position of the Government is correct, and that what the law means is that where a delay has occurred, the crew may go forward operating the train, but that it can not be held in service without violating the law (if the 16-hour period has expired), if a suitable stopping place should be reached at which it may be relieved; and that if such a place is reached and the crew is not relieved, that then there is a violation of the law and the carrier becomes responsible; that it is a carrier's duty to provide in such emergencies at suitable places for persons to relieve men who have served the full statutory period or more on account of some delay which may have arisen.

It will be urged that these views of the several courts, including that of the trial court in the case at bar, are not in harmony with, but antagonistic to, certain administrative rulings of the Interstate Commerce Commission; but we believe that a glance at these rulings will be sufficient to convince to the contrary.

On March 16, 1908, the Commission made the following ruling:

> 287 (i) Sec. 3. The instances in which the act will not apply include only such occurrences as could not be guarded against; those which involved no neglect or lack of precaution on the part of the carrier, its agents, or officers; and they serve to waive

> the application of the law to employees on trains only until such employees, so delayed, reach a terminal or relay point.

The " occurrences " that " could not be guarded against " by the exercise of the proper precaution on the part of the carrier include those instances where an unavoidable accident is the direct cause of an employee being on duty over 16 hours, and also where, after he has been on duty 16 hours, there is no " lack of precaution on the part of the carrier " in thereafter providing relief.

In conformity with the Commission's view, that, in order to prevent excessive hours of service, the carrier would send out a relief crew, unless prevented by some unavoidable accident or the like, in which event the crew so delayed might proceed to the end of its run, the operation of its train being in charge of the relief crew, the Commission, on May 5, 1908, made the following ruling:

> 74. Hours-of-service law. Employees deadheading on passenger trains or freight trains and not required to perform, and not held responsible for the performance of, any service or duty in connection with the movement of the train upon which they are deadheading, are not while so deadheading " on duty," as that phrase is used in the act regulating the hours of labor.

The law should not be so harshly construed as to compel a carrier at the exact minute the 16-hour period expires immediately to stop a train at whatever point it may happen to be and probably block

its main line until the crew has had 10 hours' rest or until a relief crew arrives. Nor has the Commission, either in its construction or administration of the law, endeavored to place such a hardship on the carrier. But having in mind possible instances where crews can not be relieved after being delayed by reason of unavoidable accidents, regardless of the precautions thereafter taken by the carrier to provide relief, the Commission made the following administrative ruling:

> May 25, 1908. Ruling 88.
>
> (*b*) Section 3 of the law provides that—
>
> "The provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen."
>
> Any employee *so delayed* may thereafter continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip. (See rule 287.) (Italics ours.)

It follows, therefore, that under these rulings an employee may be permitted to operate his train to the end of the run in those instances where he is delayed by "such occurrences as could not be guarded against" and when through "no neglect or lack of precaution on the part of the carrier" he can not be relieved.

Bearing in mind the purpose of the law, together with the fact that "every overworked man presents a distinct danger" (*M. K. & T.* v. *U. S.*, 231 U. S., 112), it is not an unreasonable construction of the same to hold that whenever an employee in train service has been continuously on duty for 16 hours he shall be relieved, not merely from that particular kind of service, but from any kind of work, unless the carrier's failure to relieve such employee is due to one of the causes set forth in the proviso. We do not believe it is sufficient for the carrier merely to say that a train was delayed by some unavoidable accident, without showing the length of the delay, or the connection between such delay and the failure to relieve the employee at the expiration of 16 hours.

It is respectfully submitted that any unavoidable accident is not, standing alone, a license to a carrier to disregard that provision of section 2 providing that an employee *shall be relieved* after 16 hours of continuous service.

The carrier will, of course, contend that the words "so delayed" refer, not to the delay in relieving an employee after he has been on duty 16 hours, but have reference to *any delay* his train may have encountered by reason of some unforeseen cause after leaving the initial terminal; and therefore unforeseen delays to a train will license any *preventable* or *inexcusable* delay in relieving the employees thereon.

As the words "so delayed" have direct reference to the word "delay," as used in the proviso, which has already been fully discussed, we do not believe it necessary to discuss any further the carrier's ingenious construction of the hours of service act and the rulings of the Interstate Commerce Commission.

In support of its contention that all its acts, avoidable and inexcusable, are pardoned and condoned when committed subsequent to an unavoidable accident, reference may be made by the carrier to the case of *United States* v. *Atchison, Topeka & Santa Fe Railway Co.* (212 Fed. Rep., 1000). But we can not entirely reconcile this case with such contention.

In the first part of the decision in the Santa Fe case, much stress is laid upon the construction of the proviso taken in connection with the administrative rulings of the Commission. At the bottom of page 1006, we find this sentence:

> In other words, the proviso takes the case out of the operation of the statute in every instance except those in which the officers or agent in charge of the employee *knew,* or could have foreseen, the existence of the cause of the delay at the time such employee left the terminal or starting point.

In other words, if we may judge by the above, the carrier would only be liable for those deliberate and willful acts of its officers and agents; and, therefore, any unforeseen delay to a train automatically

removes the employees thereon from within the provisions of the law. But if this is the correct construction of the act, why the necessity of placing reliance upon the Commission's rulings? And having placed reliance upon such rulings, why lose sight of the fact that the "instances in which the act will not apply include only such occurrences as could not be guarded against; those which involved no neglect or lack of precaution on the part of the carrier, its agents, or officers?"

However, later in the decision (p. 1008), we find this construction of the act somewhat modified. The train there involved was delayed by an accident which was admitted to have been unavoidable and unforeseen at the time the employees thereon left their terminal. If we apply the construction of the act as expressed on page 1006 to this train crew, their case would be taken out of the statute and they might operate their train to the end of their usual or customary run. But in this instance, such unavoidable and unforeseen delay does not remove the case from within the statute, for the reason that part of the time consumed in reaching the final terminal was due to hauling a car manifestly in violation of the safety-appliance act.

We have no fault to find with this view of the court; in fact, we are heartily in accord with it. But we believe that if the negligence of the carrier in hauling a car in a manner prohibited by the safety-appliance act does not take the case out of the operation of the hours-of-service act, then negligence in

another form, to wit, negligence in making no effort to relieve an employee at the end of 16 hours' service, should not remove that case from within the provisions of the act.

The criticism we have of this decision is the same we have of the carrier's contention; that "the delay," as used in the proviso, does not refer to the delay which some particular train may encounter and, therefore, excuse excess service of the employees thereon; for it must be remembered that one of the provisions of the act which does not apply in any case of causality, etc., is the provision that "whenever any such employee * * * shall have been continuously on duty for 16 hours he shall be relieved." While we have the greatest respect for the court rendering the decision in this Santa Fe case, we can neither agree with it nor with the carrier in the instant case that it is unnecessary to show any causal connection between a delay to a train on account of one of the causes enumerated in the proviso and "the delay" of the carrier in relieving the employees "so delayed" after they have been continuously on duty 16 hours.

V.

"A terminal," as used in the proviso of section 3 of the hours-of-service act, does not mean, with reference to a certain employee, only THE terminal from which he starts on his trip; it includes both the initial terminal and ANY OTHER terminal that such employee may arrive at and leave while en route to his final terminal, or end of his usual or customary run.

In the Fifty-ninth Congress, first session, April 26, 1906, Mr. Esch introduced H. R. bill 18671, which was referred to the Committee on Interstate and Foreign Commerce. The committee reported the bill back to the House on May 31, 1906, with certain amendments.

The original proviso in section 4 read as follows:

> *Provided,* That the provisions of this act shall not apply in any case where, by reason of unavoidable or unforeseen train accident or act of God occuring after such employee has left *a terminal,* he is prevented from reaching *his terminal* within the time specified in section one of this act.

The committee recommended certain amendments, so that the proviso would read as follows:

> *Provided,* That the provisions of this act shall not apply in any case where, by reason of unavoidable accident or act of God not known to the carrier or its agent in charge of such employee at the time he left *a terminal,* he is prevented from reaching *his terminal* within the time specified in section one of this act.

On May 4, 1906, at the same session of Congress, Mr. Esch introduced H. R. bill 18961, which was also referred to the Committee on Interstate and Foreign Commerce.

That bill made it unlawful to permit an employee "to remain on duty more than sixteen consecutive hours, except when by casualty occurring after such

employee has started on his trip he is prevented from reaching *his terminal.*"

On February 20, 1906, Mr. Bede introduced H. R. bill 25757, which made it unlawful to permit an employee to remain on duty more than 16 consecutive hours, " except when by casualty occurring after such employee has started on his trip or by unknown casualty occurring before he started on his trip he is prevented from reaching *his terminal.*"

On March 15, 1906, Mr. La Follette introduced Senate bill No. 5133, which is the present hours of service act. This bill gave to the Interstate Commerce Commission full power to prescribe the hours of service of employees connected with train movements. It was referred to the Committee on Education and Labor, and reported by Mr. Dolliver, with an amendment, which fixed the hours of service instead of leaving it to the Commission, and which made it unlawful to require service of an employee beyond 16 consecutive hours, " except when by casualty occurring after such employee has started on his trip he is prevented from reaching *his terminal.*"

On June 27, 1906, this bill was taken up for consideration and Senator Gallinger proposed a certain amendment, which made the proviso read as follows:

> except when by unavoidable accident, or act of God, or resulting from a cause not

> known to the carrier or its agent in charge of such employee at the time he left *the terminal,*

to which amendment Senator La Follette proposed to add the following:

> or by unknown casualty occurring before he started on his trip.

Senator Foraker proposed an amendment, which if adopted would have made the proviso read as follows:

> except when by casualty occurring after such employee has started on his trip he is prevented from reaching *his* terminal.

On January 8, 1907, Senator Dolliver offered an amendment to Senate bill 5133, which eliminated entirely the proviso and made the provisions of the act absolute.

On the same day Senator Gallinger proposed to add the following section to this bill:

> SEC. 5. That nothing in this act shall be construed to prohibit or in any way interfere with the employment, with their consent, of men whose hours of labor are affected herein, upon runs, single or turn, which, in the reasonable judgment of the officers of the respective railroads and of the men so employed, can be completed, in the ordinary course of business of the carrier, within sixteen hours.

On January 9, 1907, Senator Brandegee proposed an amendment making it unlawful for a

carrier to require more than 16 consecutive hours' service of an employee, "except when on account of an emergency, which by reasonable care on the part of such carrier, its officers or agents, could not have been avoided, he is prevented from reaching *his terminal,* * * *"

On the same day Senator Scott proposed the following amendment:

> This act shall not apply to cases where a continuance on duty beyond sixteen hours will enable an employee to reach *a terminal: Provided,* That at the expiration of sixteen hours he is within twenty miles of such terminal.

On January 10, 1907, Senator McCumber offered the following amendment to follow the word "terminal" in the proposed Gallinger amendment of June 27:

> or except when by accident or unexpected delay of trains scheduled to make connection with the train on which such employee is serving, he is prevented from reaching his terminal.

Senate bill 5133, as it passed the Senate on January 10, 1907, made it unlawful "to require or permit any employee engaged in or connected with the movement of any train carrying interstate or foreign freight or passengers to remain on duty more than 16 consecutive hours, *except when by casualty occurring after such employee has started on his trip, or by unknown casualty occurring before he*

started on his trip, and except when by accident or unexpected delay of trains scheduled to make connection with the train on which such employee is serving, he is prevented from reaching his terminal."

After passing the Senate, this bill, on January 11, 1907, was referred to the Interstate and Foreign Commerce Committee of the House, and on February 16, 1907, was reported, with an amendment, and referred to the House Calendar. The proviso then read as follows:

> *Provided,* That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its agent in charge of such employee at the time said employee left *a terminal,* and which could not have been foreseen with the exercise of ordinary prudence. (All italics ours.)

The conference committee, in its report on March 1, 1907, agreed upon several amendments, but left undisturbed and adopted the House amendment striking out the words, "his terminal."

At no time thereafter was the slightest effort made practically to stultify the act by permitting an employee, in cases of unavoidable accidents, to operate his train to the end of his usual or customary run, or, in other words, "his terminal."

CONCLUSION.

From the evidence in this case it clearly appears:

That the carrier required certain employees in train service to be and remain continuously on duty more than 16 hours.

That while the carrier relied upon unavoidable accidents as legal excuses for such service, it did not connect such accidents with its failure to relieve such employees before they had been in continuous service more than 16 hours.

That the failure of the carrier to relieve its employees before they reached the end of their runs at Los Angeles was due to its own negligence and not to unavoidable accidents.

That the unavoidable accidents relied upon by the carrier as legal excuses for prolonging the hours of service of its employees were known to the carrier, and its officers and agents in charge of the employees in question, before such employees left a terminal.

Wherefore, it is respectfully submitted that the judgment of the lower court should be affirmed.

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